Antitrust and Technology: A Need for Change in the New Era

By Cate Bashore

In the 21st century, the internet has become unescapably integrated into everyday life. As computer technology becomes increasingly necessary, companies such as Google, Amazon, and Meta have risen to dominate the market. The Federal Trade Commission (FTC) has shifted to restrain Big Tech's growth, with recent federal antitrust cases targeting major players in the market. While antitrust legislation was created to prohibit monopolization and promote competitive business practices, its application is more nuanced in the technological era. By moving beyond traditional industrial and consumer goods, modern markets have established new precedents for antitrust enforcement, raising fundamental questions about the scope of Big Tech's growth.

The Sherman Act of 1890 represented Congress's first statutory response to monopolistic behavior, aimed at Standard Oil. At its height, Standard Oil refined 95% of oil and controlled 90% of the oil refineries in the United States, acquiring or forcing smaller companies out of the market.[1] After the act passed, *Standard Oil Co. of New Jersey v. The United States* (1910) broke the company apart into 34 separate companies, ultimately evolving into ExxonMobil, Chevron, and others. The lawsuit established the "rule of reason," a principle subsequently used in other antitrust cases to determine the legality of business practices. Under the rule, if harm from anticompetitive behavior outweighs any procompetitive benefits, the business practice is unlawful.[2] Coupled with the Clayton Act of 1914, which added additional prohibitions against anticompetitive mergers and acquisitions, predatory pricing, and tying arrangements not included within the Sherman Act, the precedent established protected the rights of consumers.

Historically, antitrust laws have been predominantly evaluated from a consumer welfare perspective, weighing the costs and benefits associated with business behavior, including the impact of prices on consumers. Price discrimination, monopoly market power, and price fixing

[1] Akshay Jagtap, Aakash Biswas, and James Blaney, "The Antitrust Legacy of Standard Oil in Today's World," TWA, November 2021, http://jpt.spe.org/twa/the-antitrust-legacy-of-standard-oil-in-todays-world.
[2] "Elements of the Offense," www.justice.gov, February 19, 2015, https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement.

are examples of behavior in which such economic analysis is used. While not always straightforward, the unique structure of the market and products that technology companies sell complicate the application of antitrust laws. Evaluating the effects on consumers when services, such as Google searches, are free, and when harm is non-price-related, such as data collection and privacy protection, introduce additional layers of analysis that are unprecedented in the original intention of antitrust law.

U.S. v. Google (2025) is the most recent example of an antitrust case brought against a Big Tech company. Its decision in favor of the United States will affect the outcomes of other ongoing lawsuits of large tech companies. The plaintiff alleged that Google violated Section 2 of the Sherman Act by unlawfully maintaining its monopoly power in the general search and general search advertising markets. Google accomplished this through exclusive agreements with original equipment manufacturers that required its search engine to be set as the default on their devices. The court found that Google controlled approximately 90% of the market share for search engines on computers and roughly 95% of the market share for search engines on mobile devices, including smartphones. Ultimately, these exclusive agreements were considered unlawful not only for maintaining this high market share but also for stifling innovation and depriving users of sufficient data to effectively compete with Google.

Google argued that it did not intentionally monopolize the market; it simply offered the best product compared to competitors. As the rule of reason has established, having market power itself is not unlawful. Judge Mehta acknowledged that Google's innovation and search engine services are viewed as superior to those of competitors. Therefore, Google's monopoly over the market was not obtained unlawfully. While some aspects of the case have direct applications to antitrust laws, others are more nuanced. For example, Google's exclusive agreements more obviously apply to the Sherman Act, prohibiting "conspiracies that unreasonably restrain trade."[3] However, the results of these anticompetitive actions, and the court's decision that Google deprived competition of user data and stifled innovation, are more distinct. These arguments apply to antitrust legislation in a less tangible way than to high prices for consumers. Stifled innovation can be hard to measure, and if user data is critical to developing accurate, high-performing software and search engines, larger companies with

[3] U.S. Department of Justice, "The Antitrust Laws," Justice.gov, 2023, https://www.justice.gov/atr/antitrust-laws-and-you.

greater access to this information would produce better products than competitors. While the primary argument regarding this specific case was related to illegal exclusive agreements that exacerbated the monopoly, these intangible applications of non-price related outcomes to antitrust law will become more frequent, as the effects of Big Tech dominating technology markets are more ambiguous than price fixing or monopoly prices.

A lawsuit brought by the FTC regarding Amazon in September 2023 continues to shift the application of antitrust law from predominantly prohibiting unlawful price-based discrimination to considering additional non-tangible effects. The plaintiff in *FTC v. Amazon* alleges that Amazon has monopoly power over 2 separate markets: the online superstore market and the online marketplace for services purchased by sellers.[4] Similar to the Google case, some details are presumably less ambiguous than others. For instance, the FTC contends that Amazon engages in unlawful tying agreements, in violation of the Clayton Act, by conditioning sellers' access to its online marketplace on the use of Amazon's distribution services, thereby enabling the company to extract monopoly-level fees amounting to as much as fifty percent of sellers' total revenues. However, other aspects of their argument, including that Amazon "degrades customer experience," and promotes their own and advertised products of lower quality over high-quality products, are more nuanced. While this does demonstrate Amazon uses its monopoly power to the detriment of consumers, it provides another non-price-related example of illegal use of monopoly power.

As technology markets innovate and expand, market power has become a more nuanced discussion than simply having a monopoly over a tangible product or industry. Where price-related legislation and analysis were once sufficient, modern antitrust law applications require more complex analysis of both price and non-price factors. To promote competition and innovation while protecting consumers' interests, there is a need for antitrust legislation to respond to the evolving nature of market power, which is no longer as simple as the ability to charge a high monopoly price. Particularly in emerging technology markets, United States antitrust legislation needs to be revisited to update the list of prohibited anti-competitive

[4] Victoria Graham, "FTC Sues Amazon for Illegally Maintaining Monopoly Power," Federal Trade Commission (Federal Trade Commission, September 26, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power.

behaviors that are not price-driven to benefit consumers and ensure continued innovation.